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IN THE

Supreme Court of the United States

PAT O'LEAR, DONALD RITTERING, KAY ANN CHASE, STEVE BORRELLO, LAWRENCE KESTENBAUM, JAMES LARKIN, BARBARA LONG, GEORGE GAINES, MINNIE H. WHITING, AND CHRISTOPHER SMITH,

Appellants,

v.

CANDICE S. MILLER, CHRISTOPHER M. THOMAS, THE MICHIGAN REPUBLICAN PARTY, PATRICK MILLER, ANDREW PETTRESS, AND JAMES L. PALASKE,

Appellees.

On Appeal from the United States District Court For the Eastern District of Michigan

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APPELLANTS' BRIEF OPPOSING APPELLEES' MOTIONS TO DISMISS OR AFFIRM

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APPELLANTS' BRIEF OPPOSING APPELLEES' MOTIONS TO DISMISS OR AFFIRM

Glaringly absent from both Appellees' motions is any explanation of how even the most egregious partisan gerrymander could ever be invalidated under the District Court's interpretation of *Davis v. Bandemer*, 478 U.S. 109 (1986). By establishing a test that can never be met, the court below has rendered *Bandemer* a dead letter. Gutting *Bandemer* will give partisan redistricters the green light to entrench themselves in power and thwart the will of the majority of the electorate by packing as many politically unfriendly voters into as few districts as possible. Partisan manipulation of district lines in order to dictate electoral outcomes and consign a political party to one-third or less of a State's congressional seats, even if that party consistently wins a majority of the popular vote statewide, violates both the Equal Protection Clause and Article I of the Constitution.

I. This Court Has Jurisdiction Under Section 1253.

Appellees raise three arguments for dismissing this appeal. All three are wrong.

First, the State Appellees argue that this Court lacks jurisdiction under Section 1253 of the Judicial Code because the District Court did not expressly "'grant[] or deny[] . . . an interlocutory or permanent injunction.'" State Mot. 8 (quoting 28 U.S.C. § 1253). That argument is incorrect because the dismissal of a complaint seeking injunctive relief is a "den[ial]" of an injunction within the meaning of Section 1253. *See Lynch v. Household Fin. Corp.*, 405 U.S. 538, 541 n.5 (1972); *see also* ROBERT L. STERN *ET AL.*, SUPREME COURT PRACTICE § 2.10(b)(1), at 95 (8th ed. 2002). Appellants' complaints asked the District Court to enjoin the

State Appellees from conducting elections under Michigan's 2001 congressional redistricting plan (the "2001 Plan") and to impose a lawful remedial plan. J.S. App. 50a; Intervenors' Mot. App. 27a.[1] The court below dismissed the complaints with prejudice and thus denied all relief sought by the plaintiffs – including injunctive relief. J.S. App. 2a, 19a, 22a. This Court therefore has jurisdiction under Section 1253. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 637-39 (1993) (Section 1253 appeal from a Rule 12 dismissal for failure to state a cognizable constitutional claim); *Baker v. Carr*, 369 U.S. 186, 188, 197-98 (1962) (same).

Second, the Intervening Appellees argue that *Bandemer* applies only to state-legislative redistricting and that partisan-gerrymandering claims against *congressional* districts are nonjusticiable political questions outside this Court's jurisdiction. Intervenors' Mot. 8. This Court's majority opinion in *Bandemer*, however, cited state-legislative and congressional precedents alike, never mentioning any such distinction. *See* 478 U.S. at 118-27. Nor do the Appellees suggest any basis for drawing that distinction. Indeed, the State Appellees concede that nothing in *Bandemer* "supports limiting its equal protection analyses to state legislative redistricting challenges." State Mot. 25.

Third, the Intervening Appellees argue that Appellants lack standing under *Shaw v. Reno* and its progeny. Intervenors' Mot. 8-10. As discussed below, *see infra* pp. 6-

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[1] Appellees' statement that Appellants "nominally" sought injunctive relief and "took no steps in pursuit of that relief," State Mot. 9, is nothing short of bizarre. Permanent injunctions were the centerpiece of the plaintiffs' prayer for relief, and all parties to the lawsuit had engaged in aggressive discovery and were prepared to try the case last May when the District Court abruptly canceled the trial and dismissed the complaint. *See* J.S. 7.

7, this argument rests on a misunderstanding of the relevance of the *Shaw* doctrine to partisan gerrymandering. Moreover, Appellants have standing to challenge the 2001 Plan in its entirety, regardless of the particular districts in which they reside, because partisan-gerrymandering claims are *statewide* claims, not "individual district" claims. *Bandemer*, 478 U.S. at 127, 130, 132-34, 141 (plurality opinion); *see id.* at 146, 153 (O'Connor, J., concurring in the judgment); *id.* at 162, 169 (Powell, J., dissenting in part).[2]

II. Appellees' Construction of *Bandemer* Would Effectively Overrule It.

Appellees attempt to caricature this case as a demand for proportional representation – precisely the kind of claim the *Bandemer* Court rejected. *See* State Mot. 7, 11-12; Intervenors' Mot. 11-16, 25-26. But that is simply a mischaracterization. This case is about *the continued frustration of the will of the majority*, not some minor or transitory deviation from perfect proportionality. To demonstrate the *continued* frustration of majority rule, Appellants alleged and are prepared to prove at trial that the 2001 Plan's partisan skew is likely to be both severe and long-lasting. *See* J.S. 14; J.S. App. 27a, 29a-49a.

Under *Bandemer*, the continued frustration of the majority will is the linchpin to a successful claim of partisan gerrymandering. That is clear not only from the majority's discussion of justiciability but also from the plurality's enunciation of the threshold test for determining unconstitutionally discriminatory effects. As the opinion of the Court explained, both "our general majoritarian ethic and

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[2] In any event, Appellants reside not only in safe Democratic districts (*e.g.*, Districts 5, 13, 14, and 15), but also in safe Republican districts (*e.g.*, Districts 7, 9, 10, 11) and in the one competitive, but Republican-leaning, district (District 1).

the [Constitution's] objective of fair and adequate representation" demand "a level of parity between votes and representation sufficient to ensure that significant minority voices are heard *and that majorities are not consigned to minority status.*" *Bandemer*, 478 U.S. at 126 n.9 (majority opinion) (emphasis added). When plaintiffs belong to a State's most popular political party, "a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters." *Id.* at 133 (plurality opinion); *see also id.* at 135 (asking whether a redistricting plan "would consign the Democrats to a minority status . . . throughout the [decade]").

Appellants' claim clearly meets this test. The 2001 Plan will consign Michigan's Democratic majority to minority status for at least the next decade. Because it frustrates effective majority rule, the 2001 Plan violates *Bandemer*.

A consistent majority of voters prefer Democratic candidates in federal elections in Michigan, where Democrats have won the last three presidential contests, 8 of the last 9 U.S. Senate elections, and a majority of votes cast statewide in 13 of the last 14 U.S. House elections. J.S. 3 & n.1. Under the 2001 Plan, however, this Democratic majority can expect to capture only one-third of the State's congressional seats (5 out of 15). J.S. App. 3a, 44a-47a. In other words, the party that consistently wins the most popular support will have only half as many Representatives as the party that consistently finishes second. Even if Democrats were to increase their statewide victory margin by 10 to 15 percentage points – a shift of historic magnitude – they still would capture well under half the seats (6 out of 15) under the 2001 Plan. *See* J.S. 15; J.S. App. 46a.

This gross disparity results from a classic gerrymander. Hundreds of thousands of Democratic voters

have been "packed" into five overwhelmingly Democratic districts, which presidential candidate Al Gore won by landslide margins ranging from 23 percentage points to a whopping 66 points (83% to 17% in two districts). The remainder of the State's Democratic voters has been evenly spread, or "cracked," among the other ten districts, where they will be stuck permanently in the minority. By contrast, Republican voters have been efficiently spread among those ten districts, in each of which they comprise a majority. Nine of those ten Republican districts are so safe that they are unlikely to generate any truly competitive general elections in the coming decade.[3]

Intervening Appellees are simply incorrect in asserting that this case could alter control of only one or two seats. Intervenors' Mot. 1, 13. Al Gore – who won the statewide vote by roughly five percentage points – carried 8 of 15 districts under the alternative plans supported by Appellants, but only 5 of 15 districts under the 2001 Plan. J.S. App. 44a. If majority rule means anything, a party with consistent majority support in the electorate should get more than 5 of 15 seats. The difference between an 8-to-7 majority and a 5-to-10 minority is hardly insignificant under *Bandemer* – especially when that differential is likely to hold for an entire decade.

The District Court clearly erred by grafting additional requirements onto *Bandemer*. As explained in the Jurisdictional Statement, in actual practice no plaintiff can prove any of the three "indicia" of political powerlessness

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[3] The First District, in northern Michigan, leans Republican but currently has a strong Democratic incumbent. His presence may allow Democrats – the majority party statewide – to win 6 of Michigan's 15 seats. But if he retires from Congress in the next decade, the district will likely swing into the Republican column, generating a 10-to-5 advantage for the State's *minority* party. *See* J.S. App. 3a.

that the District Court proposed as an additional necessary element to a partisan-gerrymandering claim. *See* J.S. 2-3, 8-11, 16-20. Appellees, like the court below, point to shards of dicta from the *Bandemer* plurality opinion to show that these three "indicia" were not pulled out of thin air – a point that no one here contests. *See* State Mot. 13-17; Intervenors' Mot. 12, 15-18. But Appellees do not even attempt to explain how a plaintiff could ever satisfy any of these three tests. Thus, Appellees have not laid a finger on the central argument presented in this appeal: that the court below nullified this Court's decision in *Bandemer* by effectively making it impossible to state a claim of unconstitutional partisan gerrymandering.

III. Appellees Misunderstand the Relevance of the *Shaw* Doctrine to Partisan-Gerrymandering Claims.

Appellees' responses to the second question presented by this appeal demonstrate that they fundamentally misunderstand the relationship between the *Shaw* doctrine and the partisan-gerrymandering claims raised here. *See* State Mot. 18-22; Intervenors' Mot. 19-23. Contrary to Appellees' assertions, Intervenors' Mot. 23, Appellants did not bring a "*Shaw* political gerrymandering claim" against the 2001 Plan. *See* J.S. App. 49a; Intervenors' Mot. App. 25a. Rather, they brought a *Bandemer* claim and argued that *Shaw* and its progeny illuminate how partisan a redistricting plan must be before it violates the Equal Protection Clause. *See* J.S. 21-24.

To be sure, the legal standards for judging partisan and racial gerrymandering need not be identical. *See Shaw*, 509 U.S. at 650. But pulling them into closer alignment would bring some refreshing candor to a field of litigation that has suffered from a shortage of it. All too often, what are in reality partisan battles get fought out in the courts

under the guise of racial controversies, using either the *Shaw* doctrine or the Voting Rights Act. Bringing the standards for partisan and racial gerrymandering closer together will reduce the incentives for racially inflammatory gamesmanship in the service of partisan goals.

Considerations of race, or of political viewpoint, can be *a* factor in redistricting but cannot be *the* overriding factor. Under the *Shaw* doctrine, district courts distinguish between primary and secondary motivations of redistricting bodies: a redistricting plan is presumptively unconstitutional if race was the *predominant* motivating factor and traditional districting principles were subordinated to that predominant factor. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995). Here, Appellants' point is that, if the Constitution bars a districting plan that is "'unexplainable on grounds other than race,'" *Shaw*, 509 U.S. at 644 (citation omitted), a plan that is unexplainable on grounds other than political viewpoint also should be constitutionally suspect because this Court's First Amendment political-patronage decisions prohibit States from classifying or discriminating against citizens on the basis of their partisan affiliation. *See* J.S. 22 (citing cases).

The 2001 Plan, which jettisoned the traditional districting criteria that the Michigan Legislature enacted in 1999 and reenacted in 2001, is unexplainable on grounds other than rank partisanship.[4] The Court should make clear that such a map goes too far.

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[4] Contrary to Appellees' suggestions, *see* State Mot. 3-4 & n.4; Intervenors' Mot. 5, the Michigan Supreme Court did *not* hold that the Legislature failed to reenact the 1999 criteria in 2001 or that the 2001 Plan satisfied those criteria; it merely held that the twice-enacted criteria were nonbinding and unenforceable. *See* J.S. 6 (citing *LeRoux v. Secretary of State*, 640 N.W.2d 849, 860-64 (Mich. 2002)). Similarly, Appellees incorrectly assert that the court did not divide along partisan

IV. Appellees Have Failed to Refute the Claim that Enactment of the 2001 Plan Violated Article I of the Constitution.

As for the third question presented in this appeal, Appellees do not even try to defend the District Court's holding that Article I's Elections Clause "has no role to play" in congressional redistricting. J.S. App. 15a. That holding is simply wrong. J.S. 10, 25; Intervenors' Mot. 24.

Instead, Appellees argue that the Elections Clause cases that Appellants rely on – *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-35 (1995), and *Cook v. Gralike*, 531 U.S. 510, 522-26 (2001) – "have nothing to do with redistricting or with claims of vote dilution." Intervenors' Mot. 24; *see* State Mot. 25. They even contend that no aspect of the 2001 Plan is "remotely equivalent" to the law struck down in *Cook v. Gralike*, which "'handicap[ped] those who [sought] federal office by affixing pejorative labels next to their names on the ballot if they [did] not pledge to support the State's preferred position on a certain issue.'" Intervenors' Mot. 24 n.13 (citation omitted). But the analogy between *Cook* and this case can hardly be

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lines; in fact, all five Justices nominated by the Republican Party, but neither of the two Justices nominated by the Democratic Party, joined the majority opinion in *LeRoux*. *See* J.S. 7.

Indeed, virtually all of Appellees' charges of "mischaracterizations of the facts [and] blatantly erroneous statements," State Mot. 2 n.1, are themselves inaccurate. For example, the statistical and expert analyses cited in the Jurisdictional Statement are pulled directly from the complaint and the District Court's opinion, *see* J.S. 4 (citing J.S. App. 3a, 27a, 43a-47a) – hardly improper sources when reviewing a Rule 12 dismissal. And it should be beyond dispute that the bill passed by the Legislature on July 11 "differed" from that signed by the Governor on the afternoon of September 11, 2001. *See* J.S. 6-7; State Mot. 3; Intervenors' Mot. 3-4. Finally, it is undisputed that the 2001 Plan broke more county and municipal boundaries than did at least one of Appellants' alternative plans. *See* J.S. 5-6, 23-24.

missed: Under the 2001 Plan, even though most Michigan voters prefer Democratic candidates for federal office, at least nine of Michigan's fifteen Democratic congressional nominees will be forced to run on a ballot where being labeled as a Democrat is tantamount to certain defeat. *See* J.S. 12. That handicap was imposed on those candidates (and thus on the hundreds of thousands of Democratic voters they wish to represent) because they did not pledge to support the State's preferred position on the central issue in congressional politics today: which political party should control Congress.

Redistricting plans enacted to foster fairness and competition in congressional elections are clearly authorized by the Elections Clause. But Michigan's 2001 Plan goes far beyond evenhanded procedural regulation and instead effectively dictates electoral outcomes and severely handicaps one class of candidates. As Justice Kennedy has explained, the Elections Clause does not permit a State "to interpose itself between the people and their National Government as it seeks to do here." *Cook*, 531 U.S. at 527 (Kennedy, J., concurring). Michigan's technique may be subtler, but the end result is really no different from that in *Cook v. Gralike* – the undermining of the democratic electoral process.[5]

Finally, the State Appellees contend that the Framers' acceptance of at-large, rather than district-based, congressional elections shows that they were unconcerned with partisan gerrymandering. State Mot. 22-23. But that fact only serves to underscore Appellants' argument that this case is about majoritarian principles, not proportional

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[5] Both sets of Appellees are simply wrong in stating that voters or candidates cannot challenge state legislation as violating the Elections Clause. *See* Intervenors' Mot. 24; *see also* State Mot. 23-25. That is precisely what plaintiff Gralike did successfully in *Cook*.

representation. *Cf. supra* pp. 3-6. Having only recently wrested control from the English monarchy, the Framers were most concerned about preserving democratic majority rule. *See* J.S. 26-28; *cf. Bandemer*, 478 U.S. at 126 n.9 (citing the Constitution's "majoritarian ethic"). They fully understood that at-large elections can yield dramatically supra-proportional representation for the *majority* party, as 100% of the seats may be awarded to the party with 51% support in the statewide electorate. But unlike the 2001 Plan at issue here, at-large elections cannot hand a supermajority of seats to the *minority* party and ensure that the result holds for the next decade. Only partisan gerrymandering can do that. And as Professor McConnell has explained, partisan gerrymanders that systematically thwart majority rule and deliver effective control to a minority faction are "in obvious tension with the [Framers'] values of Republicanism." Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 116 (2000).[6]

CONCLUSION

The Court should note probable jurisdiction.

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[6] Appellees assert that Appellants' interpretation of the Elections Clause would require state legislatures to seek "absolute [political] neutrality," State Mot. at 24, to "be blind to politics in congressional redistricting," Intervenors' Mot. at 25, and to refrain from creating *any* "safe seats," *id.* at 26-27. Appellants have suggested no such thing. *See* J.S. 24 (arguing only that "the Elections Clause does not give state legislatures the power to rig congressional elections [through strategic line-drawing] and thereby thwart effective majority rule"); *see also id.* 14-15 (acknowledging that our winner-take-all political system does, and should, tend to generate supra-proportional representation for the party that earns *majority* support in the electorate).

Respectfully submitted,

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